



IN THE
Supreme Court of the United States
October Term, 1978

No. 78-617

CHARLES CULHANE and GERALD McGIVERN,
Petitioners,

versus

THE STATE OF NEW YORK,
Respondent,

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT
OF APPEALS OF THE STATE OF NEW YORK.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI.**

MICHAEL KAVANAGH
District Attorney, Ulster County
Attorney for Respondent
County Court House
Kingston, N. Y. 12401
(914) 331-3315

EDWARD M. P. GREENE
Of Counsel

Table of Contents.

	Page
Question Presented	1
Statement of the Case	2
POINT I The Court of Appeals followed long established principles of law when it affirmed the trial court's finding that the slain prisoner's dossier was not germane to the main issue herein	3
POINT II The cross-examination of McGivern as to his previous silence did not offend his constitutional rights and the closing argument contained only fair comment upon his testimony	5
CONCLUSION Because this case does not involve a question of law warranting review by this court, the petition for certiorari should be denied	6

TABLE OF CASES.

Beau v. People, 34 N.Y. 223, 230	4
Doyle v. Ohio, 426 US 610	5
People v. Culhane, 33 NY2d 90	2
People v. Culhane, 57 NY2d 418	2
People v. Culhane, 45 NY2d 757	2
People v. Sorge, 301 N.Y. 198, 202	4
People v. Schwartzman, 24 NY2d 241, 247, cert. den. 396 US 846	4

IN THE
Supreme Court of the United States

October Term, 1978

No. 78-617

CHARLES CULHANE and GERALD MCGIVERN,
Petitioners,

versus

STATE OF NEW YORK,
Respondent,

On application for writ of certiorari to the Court of
Appeals of the State of New York.

BRIEF IN OPPOSITION

Respondent opposes certiorari herein and submits this
brief to demonstrate why the cause need not be reviewed
by this court.

Question Presented

The only real question presented here is whether this
case involves a question of law of genuine importance to
the public as distinguished from the self-interest of the
petitioners.

The answer is unequivocally in the negative.

Statement of the Case

This case has been tried and reviewed three times. The first jury failed to agree and caused a mistrial. The second jury found petitioners guilty of felony murder but, on a direct appeal from a death sentence, the Court of Appeals found error in the jury selection process and ordered a new trial (*People v. Culhane*, 33 NY2d 90). The third jury also found petitioners guilty and the intermediate appellate court affirmed the conviction (*People v. Culhane*, 57 AD2d 418). A further appeal was permitted and the Court of Appeals also affirmed the conviction (*People v. Culhane*, 45 NY2d 757).

On September 13, 1968, petitioners and Robert Bowerman, three inmates of a New York State Prison, were being brought from Auburn to White Plains for a *coram nobis* hearing granted to Culhane. The felons were in the custody of two deputy sheriffs from Westchester County and the group rode in deputy Fitzgerald's car which had no security screen between the front and back seats.

Prisoners Culhane and McGivern were handcuffed to a loop in front of separate security belts which buckled in the back of each prisoner. Prisoner Bowerman's belt was fastened in the front with a chain and hasp to which his handcuffs were attached. None of the belts were connected in any way to each other. Culhane sat in the rear behind the driver, McGivern in the middle and Bowerman behind the passenger in the front seat. Each deputy had a .38 caliber revolver at his side.

They never reached White Plains for the trip ended in violence on the New York State Thruway in Ulster County. During the thwarted attempt to escape from custody, Deputy Sheriff Fitzgerald and the prisoner Bowerman were killed and both petitioners wounded.

Petitioners were charged with felony murder for causing the death of the peace officer during an attempted escape (NY Penal Law 125.25, subd. 3). At the trial the prosecution established its case through the eyewitness testimony of the surviving deputy, Joseph Singer, and circumstantial evidence. Both defendants testified in their own behalf, denying participation in the escape attempt and insisting that the slain prisoner had acted alone.

On the crucial issue of credibility, the jury accepted the testimony of the surviving deputy and found the petitioners herein guilty as charged. New York's two appellate courts, the Appellate Division of the Supreme Court and the Court of Appeals, each reviewed the record of the third trial and both courts affirmed the convictions.

POINT I

The Court of Appeals followed long established principles of law when it affirmed the trial court's finding that the slain prisoner's dossier was not germane to the main issue herein.

Petitioners urge that constitutional error was compounded when the Court of Appeals affirmed the trial court's refusal to admit into evidence Bowerman's prison records.

The defense had offered in evidence this massive file of unredacted material to show the sort of person Bowerman had been and to parade before the jury his previous attempts to escape on his own. The trial court found the evidence to be wholly collateral to the main issue of defendants' participation in the escape attempt and excluded the Bowerman file as irrelevant to the issue before the jury. The Court of Appeals simply held that, even if the

dossier disclosed a predisposition on Bowerman's part towards escape attempts, the evidence failed to exculpate defendants from personal involvement in the immediate issue. Hence, it was completely collateral to the central issue of credibility between the testimony of the surviving deputy and the testimony of the two defendants.

It is a long recognized rule that the admissibility of external evidence, not germane to the principal issue but bearing exclusively on the issue of credibility, rests within the discretion of the trial court, whose rulings are not reviewable unless the record reveals obvious abuse of discretion (*Beau v. People*, 34 N.Y. 223, 230; *People v. Sorge*, 301 N.Y. 198, 202; *People v. Schwartzman*, 24 NY 2d 241, 247, cert. den. 396 US 846).

Petitioners cannot adopt an erroneous statement of the main issue in this case and advance it as a correct version thereof. The trial's central issue never was whether Bowerman had begun the escape attempt on his own with defendants in reluctant submission to his orders, or whether they had actively aided him in the overall effort.

The crucial issue was properly positioned by the intermediate appellate court as one of credibility between the testimony of the prosecution's witness and the testimony of the two defendants. The court's comment thereon is apt (57 AD2 at p. 419):

"The jury, as it usually does, exercised its good judgment and common sense in weighing the testimony and found the defendants guilty and it would be difficult to conceive of a jury doing otherwise."

In short, there is no constitutional error in this record and no reversible error of any kind at all.

POINT II

The cross-examination of McGivern as to his previous silence did not offend his constitutional rights and the closing argument contained only fair comment upon his testimony.

Petitioners also assert that the cross-examination of McGivern about his silence until he testified at the third trial violated his constitutional right to due process as well as his privilege against self-incrimination.

They challenge both the cross-examination and the summation remarks about the testimony, and they rely heavily upon *Doyle v. Ohio* (426 US 610). Their reliance is quite misplaced for *Doyle* has no factual kinship with the case at bar.

There, this court reviewed the impeachment of an inculpatory story by cross-examination about the defendant's post-arrest silence after being advised of his constitutional rights. There, the majority opinion emphasized that the *Miranda* mandate (384 US 436) compelled the reversal of the state court convictions (*Doyle* 426 US p. 617).

Here, no such question existed. The defendant Culhane testified at the first trial. When he again testified at the third trial the prosecution on cross-examination was able to expose glaring gaps which existed in his testimony. Only after the defendant McGivern took the stand for the first time at the third trial in an apparent attempt to plug these gaps was his testimony challenged as being a recent fabrication. This claim became all the more significant when McGivern swore that, although he and Culhane were usually confined together in the cellblock and often cellmates during the period between their arrest and the third trial, he never, for some seven solid years, discussed the case with Culhane until the very eve of the third trial.

In the face of such testimony, the prosecutor's exhortation to the jury to weigh credibility carefully can only be regarded as fair comment on the evidence; hence, proper.

CONCLUSION

Because this case does not involve a question of law warranting review by this court, the petition for certiorari should be denied.

Respectfully submitted,

MICHAEL KAVANAGH,
District Attorney, Ulster County,
Attorney for Respondent,
County Court House,
Kingston, N. Y. 12401
(914) 331-3315.

EDWARD M. P. GREENE,
Of Counsel.